

**BEFORE THE SECRETARY OF STATE
STATE OF COLORADO**

CASE NO. OS 2004-002

AGENCY DECISION

**IN THE MATTER OF THE COMPLAINT FILED BY WILLIAM A. SIMPSON
REGARDING ALLEGED CAMPAIGN AND POLITICAL FINANCE VIOLATIONS BY
BAROCH FOR MAYOR, COMMITTEE TO ELECT KAREN OXMAN, COMMITTEE TO
ELECT DAVE SHUEY, GEORGE W. PARFET ESTATE, INC., AND GOLDEN GOOD
GOVERNMENT LEAGUE**

This matter arises from a complaint filed with the Colorado Secretary of State on March 3, 2004, by Complainant William A. Simpson. The Secretary of State referred the complaint to the Division of Administrative Hearings on March 5, 2004, as required by Colo. Const. Art. XXVIII, Sec. 9(2)(a). The complaint alleges that all Respondents violated certain provisions of Article XXVIII of the Colorado Constitution and that the Golden Good Government League has additionally violated the Fair Campaign Practices Act, Section 1-45-101 to 118, C.R.S. (2003) (the FCPA).

Hearing was held on May 20, 2004, before Administrative Law Judge Nancy Connick. Baroch for Mayor, Committee to Elect Karen Oxman, and Committee to Elect Dave Shuey (collectively the Candidate Committees) were represented by Thomas A. Walsh, Esq. The Golden Good Government League was represented by Jerald Devitt, Esq. William Parfet, President, appeared on behalf of the George W. Parfet Estate, Inc.

ISSUE PRESENTED

Respondents raise the issue of whether the ALJ has jurisdiction to hear this complaint based on the City of Golden's being a home rule city and having adopted ordinances which purportedly address the matters covered by Article XXVIII and the FCPA.

Claims Against Candidate Committees and Parfet Estate. Complainant contends that:

- By accepting \$1,000 contributions from the George W. Parfet Estate, Inc., the Candidate Committees each violated Art. XXVIII, Sec. 3(4)(a) of the Colo. Const., which prohibits candidate committees from accepting contributions from corporations. He also asserts that by making the contributions, the George W. Parfet Estate, Inc., violated the parallel provision of Section 3(4)(a) that prohibits corporations from making these contributions.

- Baroch for Mayor violated Art. XXVIII, Sec. 3(2), Colo. Const., which bars certain candidate committees from accepting contributions in excess of \$200, by accepting a \$1,000 contribution from F.A. Foss.

Claims Against Golden Good Government League.¹ Complainant claims that Golden Good Government League:

- Although a political committee, acted as an issue committee and failed to register as such, in violation of Art. XXVIII, Sec. 2, Colo. Const., which defines political and issue committees.
- As a political committee, violated Art. XXVIII, Sec. 3(5), Colo. Const., by accepting contributions from five identified entities or individuals in excess of \$500 per house of representatives election cycle.
- As a corporation, contributed to the Candidate Committees in violation of Art. XXVIII, Sec. 3(4)(a), Colo. Const., and was not exempt from this restriction pursuant to Art. XXVIII, Sec. 3(4)(b), because it accepted contributions from business corporations.
- Expended \$1,000 on electioneering communications but failed to submit required reports to the Secretary of State as required by Art. XXVIII, Sec. 6, Colo. Const.
- Failed to report the use of space in Hesteds Building as a rental expenditure or non-monetary contribution in violation of Art. 28, Sec. 7, Colo. Const., and Section 1-45-108, C.R.S.

FINDINGS OF FACT

1. The City of Golden is a home rule city.
2. All the violations alleged by Complainant relate to the conduct of the November, 2003 Golden municipal election.
3. Golden adopted Ordinance 1540 on April 26, 2001, and Ordinance 1456 on May 13, 1999, concerning the conduct of municipal elections in the City of Golden. Ordinance No. 1456 adopted the Uniform Election Code of 1992 in lieu of the Colorado Municipal Election Code of 1965 for the purpose of participating in any coordinated elections in Jefferson County conducted by the County Clerk and Recorder. The Ordinance authorized the Golden City Clerk to implement Golden's portion of the coordinated election in accordance with Article 20 of Title X of the Colorado Constitution, the Uniform Election Code of 1992, and all other appropriate statutes and laws. The Ordinance contains no reference to the FCPA.

¹ Based on evidence provided at hearing of the filing of amended reports, Complainant agreed to withdraw a claim asserting the filing of incomplete reports of contributions and expenditures in violation of Art. XXVIII, Sec. 7, and Section 1-45-108, C.R.S., due to a failure to list employers and occupations for certain contributors.

4. Ordinance No. 1540 authorizes Golden regular municipal elections to be conducted by the Jefferson County Clerk and Recorder as part of a county-wide coordinated mail ballot election. The general subject matter of Ordinance No. 1540 is Golden's participation in coordinated mail ballot elections. In Section 2, however, the Ordinance specifically provides as follows: "The regular municipal elections will be conducted in accordance with the provisions of the Uniform Election Code, as authorized by Ordinance No. 1456 and with the provisions of the Fair Campaign Practices Act." Neither Ordinance 1456 nor Ordinance 1540 references Article XXVIII, which was not enacted until 2002.

5. James A. Windholz, the City Attorney of Golden, drafted Ordinance 1540 at the direction of the Golden City Council. The City Council directed Windholz to draft Ordinance 1540 to adopt by reference the version of the FCPA that existed at the time, *i.e.*, the one in effect in April, 2001. It was Windholz' intent in drafting Ordinance 1540 and the City Council's intent in adopting it to make Golden municipal elections subject to the April, 2001 version of the FCPA but not any amendments that might later be made to the FCPA. Had Windholz intended to provide that Golden municipal elections would be governed by the FCPA as it might later be amended, he would have used different language in Ordinance 1540. It is Windholz' belief that if the City Council wishes to make Golden municipal elections subject to amendments to the FCPA that were made after April, 2001, the City Council must specifically adopt those amendments. Otherwise, the amendments have no effect in relation to Golden municipal elections.

6. Significant confusion existed regarding what legal prohibitions, campaign contribution limits and other campaign finance standards applied to the 2003 Golden municipal elections, even in printed materials distributed by the city and among city officials. Windholz never discussed with the Susan Brooks, the Golden City Clerk, his view that the 2001 version of the FCPA governed that election. Brooks did not view Ordinance 1540 as directing that anything other than the 2003 version of the FCPA would apply to Golden elections. It was the policy of the Golden City Clerk's office to follow the current version of the FCPA. The City Clerk's Office distributed to municipal candidates materials it believed were applicable to the November, 2003 election, including Article XXVIII of the Colo. Const. and the current version of the FCPA.

DISCUSSION AND CONCLUSIONS OF LAW

I. Jurisdiction

At hearing Respondents presented additional evidence, as reflected in the Findings of Fact above, regarding the intent of the Golden City Council in adopting Ordinance 1540 and its reference to the FCPA. Respondents contend that the Secretary of State and therefore the ALJ lack jurisdiction to hear this complaint because

Golden is a home rule city and one that has by ordinance addressed “any of the matters covered by” Article XXVIII or the FCPA.²

Pursuant to Section 1-45-116, C.R.S., and Rule 7.1, 8 CCR 1505-6, neither Art. XXVIII nor the FCPA in its current version applies to a home rule city that has adopted an ordinance addressing any of the matters covered by either. Section 1-45-116, C.R.S., reads as follows:

Any home rule county or municipality may adopt ordinances or charter provisions with respect to its local elections that are more stringent than any of the provisions contained in this act. Any home rule county or municipality which adopts such ordinances or charter provisions shall not be entitled to reimbursement pursuant to subsection 1-45-112(2). *The requirements of article XXVIII of the state constitution and of this article shall not apply to home rule counties or home rule municipalities that have adopted charter, ordinances, or resolutions that address the matters covered by article XXVIII and this article.*

(Emphasis added).³

It is important to note at the outset that neither Ordinance 1456 nor Ordinance 1540 contains any content that covers the subjects addressed in Article XXVIII or the FCPA. Rather, the only language at issue is Ordinance 1540's statement that Golden municipal elections will be conducted in accordance with the FCPA. In denying the prehearing motion to dismiss, the ALJ concluded that this reference in Ordinance 1540 to the FCPA affirmatively embraced state regulation. It appeared that as a home rule city, Golden had not opted out of the constraints imposed by either Article XXVIII or the FCPA by adopting its own ordinances on the matters addressed by these provisions.

The evidence at hearing, however, sheds new light on this issue. Given the uncontroverted evidence elicited at hearing, it is now clear that Golden has exercised its home rule prerogative to address matters covered by the FCPA by adopting the 2001 version of the FCPA. It has not merely acknowledged that state regulation through the FCPA applies to it. Rather, it has adopted as its own regulatory scheme the 2001

² Golden Good Government League also relies on Article XX, Sec. 6 of the Colo. Const., the home rule amendment, which provides that home rule cities shall have all powers necessary to govern local matters, including “[a]ll matters pertaining to municipal elections in such city or town, and to electoral votes therein on measures submitted under the charter or ordinances thereof” Golden Good Government League argues that on the basis of this constitutional provision alone, the FCPA and Article XXVIII do not apply to Golden municipal elections. The ALJ, however, is bound to apply the specific statutory provisions of Section 1-45-116, C.R.S., which address the test for such applicability.

³ Rule 7.1 reads as follows:

The requirements of Article XXVIII of the State Constitution and of Article 45 of Title 1, Colorado Revised Statutes, shall not apply to home rule counties or home rule municipalities that have adopted charters, ordinances, or resolutions that address any of the matters covered by Article XXVIII or Title 1, Article 45.

FCPA. The intent of the Golden City Council to adopt a static version of the FCPA, that in existence in April, 2001, makes it clear that Ordinance 1540 was in fact an ordinance addressing matters covered by the FCPA and not merely an affirmation of Golden's intent to be governed by that state statute.

With the passage of time since the adoption of Ordinance 1540, the effect of Golden's having adopted the 2001 version of the FCPA has become more apparent. While the legislature has made significant amendments to the FCPA and Colorado voters have enacted Amendment 27, which became Article XXVIII of the Colorado Constitution, the law in this area governing Golden's municipal elections has not changed. By its enactment of Ordinance 1540 in 2001, Golden has therefore over time set itself apart from other entities under state regulation.

Having enacted its own ordinance in this area, Golden no longer relies on the Secretary of State for enforcement. The 2001 version of the FCPA adopted by reference by Golden does contain provisions authorizing the filing of complaints with the Secretary of State and the holding of hearings by administrative law judges on behalf of the Secretary of State [Sections 1-45-111(2), C.R.S. (2000)], but these provisions are no longer effective. The Secretary of State derives her authority from the state constitution and state statutes, not ordinances adopted by the City of Golden. Thus, no enforcement mechanism naming the Secretary of State contained in the 2001 FCPA and referenced by Ordinance 1540 can properly authorize the Secretary of State to take action in relation to asserted violations. The absurdity of giving the Secretary of State any such enforcement authority is illustrated by the fact that the Secretary of State would be enforcing in Golden outdated campaign contribution limits, for example, that have been superseded elsewhere by Article XXVIII.

Accordingly, since the City of Golden has adopted Ordinance 1540, an ordinance that addresses matters covered by the FCPA, the ALJ has no jurisdiction to hear the complaint in this matter.

II. Attorney Fees

The Candidate Committees and Golden Good Government League have requested an award of attorney fees based on their assertion that the complaint filed is frivolous and groundless. To the extent that these Respondents rely on Section 13-17-101 and 102, C.R.S., these provisions apply only to courts of record, not to administrative proceedings. Section 13-1-111, C.R.S. [definition of "courts of record"]. To the extent that Respondents rely on Section 13-16-107, C.R.S., providing for an award of costs in the event of judgment on a motion to dismiss against a plaintiff, this provision is also inapplicable in administrative proceedings.

To the extent that Respondents rely on C.R.C.P. 11, that rule provides that four prerequisites must be met before pleadings may be filed: 1) there must be a reasonable inquiry into the facts and the law; 2) the signer must reasonably believe

based on his investigation that the pleading is well grounded in fact; 3) the legal theory asserted must be based on existing legal principles or a good faith argument for modification of existing law; and 4) the pleading must not be filed for the purpose of causing delay, harassment or an increase in the cost of litigation. *Maul v. Shaw*, 843 P.2d 139 (Colo. App. 1992). Respondents have not addressed these factors but have offered to file a memorandum if the ALJ is inclined to award attorney fees.

This matter has been resolved on the issue of jurisdiction. Complainant's claim that the Secretary of State has jurisdiction to hear this complaint was neither frivolous nor groundless. There was significant confusion regarding the campaign finance laws applicable to the 2003 Golden municipal election, with the City Clerk's office informing candidates that both the 2003 version of the FCPA and Article XXVIII applied. Before hearing the evidence at hearing, the ALJ denied Respondents' motion to dismiss based on lack of jurisdiction. Because the complaint was resolved based on a lack of jurisdiction, the ALJ has not addressed the merits of Complainant's claims. No claim based on Complainant's legal theories on the merits can therefore be supported. The ALJ therefore finds that no sanction is appropriate pursuant to C.R.C.P. 11.

AGENCY DECISION

It is the Agency Decision that the complaint in this matter is dismissed.

DONE AND SIGNED

May 26, 2004

NANCY CONNICK
Administrative Law Judge

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the above **AGENCY DECISION** was served by facsimile to:

William Simpson
815 9th Street
Golden, CO 80401

George W. Parfet Estate, Inc.
C/o William Parfet
1300 8th St.
Golden, CO 80401

Jerald Devitt, Esq.
2201 Ford St.
Golden, CO 80401

Thomas Walsh, Esq.
2201 Ford St., Suite 203
Golden, CO 80401

William Hobbs
Deputy Secretary of State
1560 Broadway
Suite 200
Denver, CO 80202

on this ____ day of June, 2004.

Os 04-002 dec

Assistant to Administrative Law Judge